

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON**

CRIMINAL ACTION NO. 5:17-CR-121-KKC

UNITED STATES OF AMERICA

PLAINTIFF

V.

**UNITED STATES' RESPONSE TO
DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA**

KENNETH GRAVITT

DEFENDANT

Comes now the United States, by and through counsel, and hereby responds to the defendant's motion to withdraw his plea of guilty. The defendant cannot show "a fair and just reason for requesting the withdrawal." Fed.R.Crim.P. 11(d)(2)(B). Accordingly, his motion to withdraw his guilty plea should be denied.

A defendant does not have an absolute right to withdraw a guilty plea and has the burden of proving that he is entitled to withdraw it. *United States v. Ellis*, 470 F.3d 275, 280 (6th Cir. 2006). "When a defendant has entered a knowing and voluntary plea of guilty at a hearing at which he acknowledged committing the crime, the occasion for setting aside a guilty plea should seldom arise." *Id.* (quoting *United States v. Morrison*, 967 F.2d 264, 268 (8th Cir.1992)). This is because the "withdrawal of a guilty plea is inherently in derogation of the public interest in finality and the orderly administration of

justice.” *Id.* (quoting *United States v. Horne*, 987 F.2d 833, 837 (D.C.Cir.1993). When reviewing a motion to withdraw a guilty plea, the court should consider a number of non-exhaustive factors in determining whether relief under Rule 11(d)(2)(B) is appropriate. They include:

- (1) The amount of time that elapsed between the plea and the motion to withdraw it;
- (2) The presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings;
- (3) Whether the defendant has asserted or maintained his innocence;
- (4) The circumstances underlying the entry of the guilty plea;
- (5) The defendant's nature and background;
- (6) The degree to which the defendant has had prior experience with the criminal justice system; and
- (7) Potential prejudice to the government if the motion to withdraw is granted.

Id. at 281 (quoting *United States v. Bashara*, 27 F.3d 1174, 1181 (6th Cir.1994) (superseded by statute on other grounds as recognized in *United States v. Caseslorete*, 220 F.3d 727, 734 (6th Cir.2000)). A review of these factors in the instant case support a denial of the defendant's motion to withdraw his guilty plea.

1. The amount of time that elapsed between the plea and the motion to withdraw

The length of time that passed between the plea and the motion to withdraw it is a factor that does not support the defendant's motion. Gravitt entered a guilty plea on May

7, 2018, the day he was scheduled to stand trial. [R. 21, Minute Entry for Rearrangement]. He moved to withdraw his plea exactly 7 weeks, or 49 days, later. [R. 24: Defendant's Motion to Set Aside Guilty Plea]. The Sixth Circuit has found a delay period of only 30 days is "at the boundary line between what is acceptable and what is not." *United States v. Jannuzzi*, 2009 WL 579331, at *3 (6th Cir. March 6, 2009). The defendant's delay of 7 weeks is longer than what has been deemed to be an acceptable delay in many cases and militates against granting his motion. See *United States v. Spencer*, 836 F.2d 236, 239 (6th Cir. 1987) (rejecting a motion to withdraw after thirty-five days); *United States v. Durham*, 178 F.3d 796, 799 (6th Cir. 1999) (seventy-seven days), *United States v. Baez*, 87 F.3d 805, 808 (6th Cir. 1996) (sixty-seven days), *United States v. Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988) (fifty-five days)).

2. The presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings

The Defendant has shown no valid reason for failing to make an earlier motion to withdraw his plea. The alleged circumstances leading the defendant to withdraw his plea of guilty were, by his own admission, known to the defendant immediately after pleading guilty. However, he waited 7 more weeks before filing his motion to withdraw his plea.

3. Whether the Defendant has asserted or maintained his innocence

The Defendant has not "clearly maintained" his innocence throughout this matter. In fact, the Defendant has acknowledged his guilt. The Defendant pleaded guilty to the

instant charge. [R. 21, Minute Entry for Rearraignment]. During the arraignment, the Defendant engaged in a colloquy with the court during which he admitted that he was guilty of the charges against him.

4. The circumstances underlying the entry of the guilty plea

The circumstances underlying the entry of the guilty plea weigh against granting the Defendant's motion to withdraw his plea. The District Court was thorough in explaining the Defendant's plea of guilty. The Defendant was informed of the ramifications of the plea, the constitutional protections he was giving up, and the maximum statutory penalties. The Defendant agreed that the plea was entered voluntarily and that he was satisfied with his counsel.

Moreover, the evidence refutes Gravitt's argument about why he chose to enter a plea of guilty. Gravitt asserts that his decision to enter a plea of guilty was the result of a moment of fear and panic arising from seeing his wife in tears in the back of the courtroom the morning trial was to begin. However, the evidence shows that Gravitt was considering a plea of guilty prior to the beginning of trial. Late on the night before trial, May 6, the undersigned noticed on his office cell phone a voice message from Gravitt's attorney, Chuck Arnold, left earlier in the afternoon, requesting a return call. Additionally, Gravitt's other attorney of record, Chris Miller, a short time later, sent the undersigned an inquiry by email asking: "Are you in your office?" The undersigned replied to Mr. Miller, asking whether he still wanted to speak at that late hour. [Affidavit of Kenneth Taylor, Attachment A]. No conversation ensued that night, but in the context of the next morning's events, it

is clear that the basis for their overtures was their client's change of heart about standing trial, and his desire to seek a plea deal. On the morning of trial, defense counsel confirmed that they had tried to reach the prosecutor the day before, without success, and that they requested time to discuss a plea agreement before calling in the jury. From this, it is clear that Gravitt's desire to plead guilty was not the result of momentary panic arising from his wife's emotional distress. The decision was made to seek a plea deal hours, if not days, before the Defendant entered the courtroom to stand trial. Because the defendant's maneuvering appears to be strategic and calculated to thwart the Government's preparation and prosecutorial momentum, this prong also weighs against allowing the defendant to withdraw his plea deal.

5. The Defendant's nature and background degree to which the Defendant has had prior experience with the criminal justice system

There is nothing in the Defendant's nature and background to suggest that he was in any way incapable of understanding the charges against him or understanding the ramifications of his decision to plead guilty. Gravitt is well-educated and a long-time businessman and Chief Executive Officer, accustomed to processing difficult decisions involving the balancing of competing interests. He certainly understood the implications of his choice to change his plea to guilty.

6. The degree to which the Defendant has had prior experience with the criminal justice system

The Defendant has had no significant experience with the criminal justice system prior to the instant case. However, he is represented by two able lawyers that presumably explained to him the ramifications of pleading guilty prior to his change of plea. Moreover, the proceedings in this case lasted a substantial amount of time, giving the defendant a significant time to process his options prior to his change of plea.

7. Potential prejudice to the Government if the motion to withdraw is granted

Prejudice to the government need not be addressed unless the Defendant first establishes a fair and just reason for withdrawing his plea. *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991). However, the Defendant's withdrawal of his plea would result in substantial prejudice to the Government and is the most compelling reason that the defendant's motion should be denied.

Unlike a simple felon-in-possession or hand-to-hand drug buy case, where there are only a couple of witnesses and a few physical exhibits, this case involved numerous expert witnesses—some traveling from out of state— complicated environmental tests, results of an extensive audit history, and numerous transactional witnesses. This case was scheduled for trial on three different dates, all of which involved the Government preparing for trial with its witnesses. Government witnesses already were frustrated with the starting and stopping process, and the necessity to prepare for trial on multiple occasions. After the defendant's entry of a guilty plea, the witnesses were told there would be no trial. To change that at this late date, and require the witnesses to prepare for this trial a fourth time, would result in extreme frustration and anger on the part of the witnesses, causing a great amount of prejudice to the Government.

Moreover, there would also be financial prejudice incurred by the Government if the defendant is allowed to withdraw his plea. Plane tickets were purchased and lodging was booked for all the witnesses for the defendant's original trial. Because the defendant did not enter his plea of guilty until the morning trial was to begin, one witness had already travelled from Nashville the morning of the trial. Additionally, the case agents came to Lexington for trial preparation and spent several thousands of dollars in travel, food and lodging. All of these arrangements and costs will have to be replicated if the defendant is allowed to withdraw his plea of guilty.

Especially prejudicial is the further and significant delay in getting this case resolved that would result from a withdrawn guilty plea. The undersigned has a two to three-week trial starting July 24, and a two-week trial starting August 29. Co-counsel also has trials scheduled through September. Both of the EPA case agents who worked this case have received promotions to supervisory roles, and no longer do field investigative work. It will be very inconvenient and burdensome for them to leave their supervisory roles for extended periods-of-time to prepare for and attend trial. In addition, the lead agent has mandatory training in both November and December that was rescheduled several times due to the prior continuances in this case. In short, the granting of the motion to withdraw the guilty plea would be extremely prejudicial to the Government.

Conclusion

Based upon a consideration of the relevant factors in totality, the Defendant has not established "a fair and just reason" for withdrawing his plea of guilty. His motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 28, 2018, I electronically filed this document through the ECF system, which provided notice to counsel of record.

/s/ Kenneth R. Taylor
Assistant United States Attorney

ATTACHMENT A

AFFIDAVIT

I Kenneth R. Taylor, first being duly sworn, deposes and says:


1. I am co-counsel for the government in *Unites States v. Kenneth Gravitt*, Criminal Action 5:17-CR-19, in the U.S. District Court for the Eastern District of Kentucky.

2. On the evening of Sunday, May 6, 2018, at 10:11 pm, I observed on my government issued cell phone that at 1:39 pm that day I had received an email from Chris Miller, defense counsel for Kenneth Gravitt that said “are you in your office now?” I also noticed that I had received a voice message from Gravitt’s other attorney, Chuck Arnold at 2:04 pm. The message was: “Ken, Chuck Arnold. . . give me a call if you get this message before Monday morning . . .” I responded to Mr. Miller’s email with a reply: “For some reason, just saw this. Can you still talk?” There was no reply to my email and there was no discussion between the parties that evening.

3. The next morning, as I walked into the courthouse, I was met by Mr. Arnold and Mr. Miller and was told that their client was interested in a guilty plea and that was the reason they were reaching out the day before. Later, in open court, Mr. Miller told the Court they had tried to reach me about working a deal on Sunday, but were unsuccessful. He then asked the Court for time for the parties to discuss the matter. The Court granted the request.

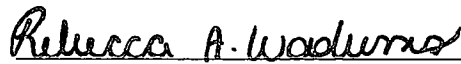
The above-statement is true and correct to the best of my knowledge.

Further, Affiant sayeth naught, on this 27 day of June, 2018.



Kenneth R. Taylor
Assistant United States Attorney
260 W. Vine Street, Suite 300
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Subscribed and sworn before me this 27th day of June, 2018.



Rebecca A. Woolums
Notary

My commission expires 2/28/2022. My Notary ID is 596058.